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No. 83-1913

IN THE

Supreme Court of the United States

October Term, 1983

LETCHER T. WHITE

Petitioner,

v.

JEFFREY MINING MACHINERY COMPANY,
JEFFREY GALION INC. and
DRESSER INDUSTRIES, INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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RULE 28.1 STATEMENT LISTING ALL PARENT COMPANIES, SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES) AND AFFILIATES OF RESPONDENTS

The affiliates of Dresser Industries, Inc. are as follows:

Airetool and Yost Superior Realty, Inc.
Aldia, S.A.
Baramin, S.A. de C.V.
Barmex S.A.
Bartil, Inc.
CETCO (Construction Equipment) Limited
China Petroleum Logging-Dresser Atlas Corporation Service Co.
Arabian Minerals & Chemicals Limited
Arabian Rockbits & Drilling Tools Company, Ltd
Dresser Al-Rushaid Machinery Co., Ltd.
Dresser Al-Rushaid Valve and Instrument Company
Dresser Atlas Arabia, Ltd.
Dresser Cameroun S.A.R.L.
Dresser Gabon S.A.
Dresser Products S.A.
International Oil Field Engineering Ltd.
Magcobar Manufacturing Nigeria Limited
Magnesital-Feuerfest GmbH
Oilfield Minerals & Chemicals Sdn. Bhd.
P.T. Dresser Magcobar Indonesia
Thailand Barite Co. Ltd.
Dresser (Kuwait) S.A.K.
Dresser Nigeria Ltd.
Magcobar (Libya) Ltd.
Dresser do Brasil, Ltda.
Drescon Productos de Perfuracao, S.A.
Melbar Productos de Lignina Ltda.
Dresser Mineracao, Ltda.
Industrias Flir, S.A.

Compania Minera Norex, S.A.
Mec-Track, S.p.A.
Mykobar Mining Company S.A.
Nile Oilfield Engineering Limited
Refractarios Chilenos, S.A.
Construcciones Refractarias RECSA Ltda.
Refractarios Peruanos, S.A.
Wayne (West Africa) Limited

Jeffrey Mining Machinery Company became a division of Dresser Industries, Inc. Jeffrey Galion Inc. changed its name to Jeflion Investment Co. and the assets thereof were acquired by Dresser Industries, Inc.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

I.

NO QUESTION WARRANTING REVIEW IS PRESENTED

The "Question Presented" by petitioner is not involved in this case because the Court of Appeals did *not* hold that it "need not accord the deference to jury fact-findings" that this Court has held "is constitutionally required by the Seventh Amendment."

The Court of Appeals *expressly* recognized and applied the constitutional standard of review established by this Court. The court concluded (Pet. App. B, p. 9b) that the evidence presented by petitioner was so unrelated to the *claims* of the patent that "the jury was not here required to evaluate the question of obviousness in light of the invention *as claimed* . . . " (Emphasis the court's). The court then held that "the jury could not reasonably have concluded that the invention defined" in the claims involved "would have been unobvious to a person of ordinary skill in the art at the time the invention was made." The holding of the Court of Appeals is fully in compliance with the requirements of the Seventh Amendment and no question is presented herein which warrants review by this Court.

II.
COUNTERSTATEMENT OF THE CASE
A. Introduction

Petitioner's assertions as to the action of the Court of Appeals in this case are incorrect and unjustifiable. That court did not make "extensive *de novo* fact-findings, without viewing the record." It did *not* make *de novo* fact findings "contrary to substantial evidence" presented at the trial. It did *not* hold that it "did not have to view disputed facts in a light favorable to the jury findings."

What the Court of Appeals did do was review the jury's findings and the evidence and conclude *as a matter of law* that no reasonable person could have concluded that the invention defined in the *claims* in issue would have been unobvious to a person of ordinary skill in the art at the time the alleged invention was made.

Under all the authorities, such a legal conclusion fully justifies the entry of judgment n.o.v. and a reversal of the lower court's failure to enter such a judgment. See the cases cited and discussed, *infra*, pages 8-13. While petitioner argues (without foundation) that the court did not view all facts and inferences in the light most favorable to petitioner, petitioner does recognize (Pet. p. 2) that, under the Seventh Amendment, a jury decision should be reversed if the court concludes "that no reasonable person could have agreed with the jury." This admission by petitioner in the light of the express holdings of the court below really disposes of the petition.

B. The Alleged Invention of Patent No. 3,524,680 (the '680 Patent)

Petitioner's statement of "the invention" bears no resemblance to the facts established by the record. Only a small prototype of the alleged invention disclosed in the '680 patent was built and that prototype bore no resemblance to the shortwall machine such as the 101-MC involved in this action. There is no proof here of any sevenfold increase in productivity of the type of miner disclosed in the patent involved in this lawsuit.

The '680 patent is directed primarily to a longwall mining machine. It discloses (see the illustration Pet. App. B, p. 4b) a machine having a shaft supporting helices or augers carrying cutting elements. A scavenger board is connected to the shaft and is located on the side of the shaft opposite the coal vein and combines with the coal vein and the mine floor to form a trough into which the cut coal drops. Rotation of the helices cuts the coal and moves the cut coal along the trough to a conveyor which carries the coal away from the face being mined. Rams having pistons therein serve to move the helices into contact with the face of the coal.

Claims 1, 12 and 13 are the only claims involved. Each is a combination claim and specifies various elements of a mining machine. Undisputed testimony identifies those elements specified in the claims and shows that each and every element or feature specified in those claims was disclosed in the prior art in combination with the other elements. Also, undisputed testimony shows that each of the elements specified in the claims performs the same functions in the same way to accomplish the same results as those elements in the various prior art patents.

C. The Origin and Accomplishments of the 101-MC Miner in Issue

Jeffrey* has been a leading manufacturer of mining machinery for many years. It developed and manufactured the 100-L continuous mining machine for low seams of coal as early as 1960. That continuous miner employs helical augers with cutting bits on their peripheries. The augers are moved laterally into the coal face and cut the coal from the face and convey the cut coal to another conveyor for removal. A longitudinally extending plow or board is positioned behind each auger and that plow, the mine floor and the face of the coal seam form a trough in which the auger conveys the coal to the central conveyor. The cutting and conveying characteristics of the 100-L are the same as those disclosed in the White '680 patent.

Jeffrey also developed the 120 Heliminer series of continuous mining machines in the early 1960s long before White entered the picture. The Heliminer, like the 101-MC miner in suit, is mounted on crawlers and has two helices with cutting bits on their peripheries. The helices are moved into the coal face to be mined and are arranged so that they cut the coal and feed the mined material toward the center of the machine. An apron at the front of the machine and gathering arms move the coal into a central conveyor which moves the coal to the rear of the machine.

The 101-MC Helimatic machine (see the illustration, Pet. App. B, p. 5b) was designed to operate only in low seams of coal. It is mounted on crawlers. It has a cutting head with helices having cutter bits on their peripheries. The mining head is moved laterally into the face of the

*"Jeffrey" is used herein to designate Jeffrey Mining Machinery Company alone or all of the respondents.

coal seam and the cutting bits on the helices cut the coal. The cut coal drops to the floor of the mine. The helices act as screw conveyors feeding the coal to a central mat conveyor which transports the coal rearwardly of the machine.

Fundamentally, the 101-MC is the same type of mining machine as the 120 Heliminer. The only difference is that the Heliminer, which was designed to cut high seams, uses an apron together with gathering arms to move the cut coal onto the central conveyor for carrying the coal away from the coal face.

D. The Prior Art

In addition to the basic machines provided by Jeffrey many years ago, i.e., the 100-L and the 120 Heliminer mentioned above, the prior art comprises the Von Hippel patent No. 3,445,139 (see the illustration Pet. App. B, p. 5b), the Newton et al. patent No. 3,161,439 (Pet. App. B, p. 6b) and the Seidelbach East German patent No. 20,646 (Pet. App. B, p. 7b). Each of those prior art patents discloses in combination each of the elements specified in the claims in suit and each performs the same functions in the same way to accomplish the same results as those elements set forth in the claims, as discussed by Dr. Starkey, respondents' expert. *That testimony stands undisputed.* Dr. Starkey pointed this out by reference to a chart and petitioner's expert agreed with Dr. Starkey's chart and the conclusion that Seidelbach, Newton et al. and Von Hippel disclosed each of the elements specified in the claims in issue.*

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*Petitioner tells the Court that "two of the fifteen expert witnesses" agreed in many respects according to the court below. There were not fifteen experts. There were *two*, one presented by each side, and they agreed on the essential features of the prior art and the disclosures contained therein, as the court below recognized.

E. The Decisions Below

The District Court did not write any Opinion discussing the various issues. It merely overruled Jeffrey's motions for judgment notwithstanding the verdict and for a new trial. On the legal issue of obviousness, the District Court stated that, if the question of obviousness was one of law, the court adopted the jury's answers to interrogatories.

On respondents' appeal, the Court of Appeals for the Federal Circuit reversed the lower court's denial of Jeffrey's motion for judgment n.o.v. and vacated the award of damages. The initial Opinion of the Court of Appeals was issued on December 7, 1983, but the court issued a revised Opinion arriving at the same conclusion, namely, that Jeffrey's motion for JNOV should have been granted. The court held as a matter of law that no reasonable person could come to the conclusion that the subject-matter *claimed* would have been unobvious to a person of ordinary skill in the art at the time the alleged invention was made.

White petitioned for a rehearing urging the constitutional issue raised in the petition to this court. The Court of Appeals, on February 22, 1984, denied that petition.

III.
SUMMARY OF REASONS FOR DENYING THE WRIT

The "Question Presented" as stated by petitioner is not even present in the case.

None of the considerations governing review on certiorari is applicable to this case.

The standard of review required by this Court in order to provide compliance with the requirements of the Seventh Amendment was applied by the court below in this case.

Contrary to petitioner's representations, the Court of Appeals did not indulge in *de novo* fact finding on the appeal. It reviewed the evidence, viewing all facts and inferences in the light most favorable to the prevailing party, and concluded that no reasonable person could have agreed with the jury on the issue of obviousness.

IV.
ARGUMENT—REASONS FOR DENYING THE WRIT

A. None of the Considerations Governing Review on Certiorari Is Present Here

There are no "special and important reasons" involved in this action justifying review by this Court. The court below did not render a decision in conflict with the decision of another Federal Court of Appeals. It did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. It did not decide a federal question in a way in conflict with the applicable decisions of this Court. On the contrary, the decision of the court below is in direct conformity with the decisions of this Court establishing the standards of review required to satisfy the Seventh Amendment when reviewing an appeal from a denial of judgment notwithstanding the verdict.

B. The Correct Review Standard Was Applied by the Court Below

Petitioner's entire presentation is based upon the fallacy set forth in the "Question Presented," namely, that the court below held it need not accord the deference to jury fact-findings that this Court has held is constitutionally required by the Seventh Amendment. No such disregard of the appropriate standards was indulged in by the court below.

The court below recognized that the scope and content of the prior art was not an issue, that the level of ordinary skill in the art was not a point of serious disagreement and that the two experts agreed in many respects on their evaluation of the differences between the *claimed invention* and the prior art. Recognizing that the parties were in substantial agreement on the facts bearing on the question of obviousness, the court proceeded to review the evidence and concluded *as a matter of law* that, as to each of the claims in issue, "the jury could not reasonably have concluded that the invention defined" by the claims "would have been unobvious to a person of ordinary skill in the art at the time the invention was made."

Moore's Federal Practice, Second Edition, Vol. 5A, pages 50-24 *et seq.*, points out that, until *Brady v. Southern Railroad Co.*, 320 U.S. 476 (1943) was decided by this Court, the federal courts had not clearly opted between the standard that permitted a court to direct a verdict on the basis of a strong preponderance of the evidence and the "reasonable man" type of standard, and that in the *Brady* case this Court announced the appropriate standard as follows (pp. 479-80):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway v. United States*, 319 U.S. 372; *Pence v. United States*, 316 U.S. 332; *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, n. 1; *Anderson v. Smith*, 226 U.S. 439; *Coughran v. Bigelow*, 164 U.S. 301, 307; *Gunning v. Cooley*, 281 U.S. 90, 93, note; *Seaboard Air Line v. Padgett*, 236 U.S. 668, 673; *Parks v. Ross*, 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), §§2494 et seq."

Professor Moore cites a vast number of cases in support of the above and states that, since the *Brady* decision, the federal courts have been consistent in the application of the *Brady* rule. That is the rule applied here.

The decision of the court below is in accord with the recent decision of the Court of Appeals for the Seventh Circuit, sitting *en banc*, in *Dual Mfg. & Engineering v. Burris Industries*, 619 F. 2d 660 (7 Cir., 1980), *Cert. Den.* 449 U.S. 870 (1980). In that case, as here, the court noted that the subsidiary fact of the scope and content of the prior art did not present a factual dispute, that there was no disputed factual determination in regard to the differences between the prior art and the claims in issue and that there was also no real dispute on the level of ordinary skill in

the art. In view of this, the court held that the record presented a case in which there was left only the matter of determining "as a question of law" whether the claimed subject-matter would have been obvious. The court, under such circumstances, proceeded to determine the legal issue of obviousness and reversed the judgment of the lower court based upon a jury verdict of validity.

In *Boeing Company v. Shipman*, 411 F. 2d 365 (5 Cir., 1969), the court *en banc* stated (p. 374):

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper."

In this connection, see also *Ryan Distributing Corporation v. Caley*, 147 F. 2d 138, 140 (3 Cir., 1945); *Klein v. District of Columbia*, 409 F. 2d 164, 167 (D.C. Cir., 1969); *Taylor v. National Trailer Convoy, Inc.*, 433 F. 2d 569, 570-71 (10 Cir., 1970); *Giordano v. Lee*, 434 F. 2d 1227, 1231 (8 Cir., 1970); *Gillham v. Admiral Corp.*, 523 F. 2d 102 (6 Cir., 1975), *Cert. Den.* 424 U.S. 913; *Armstrong v. Commerce Tankers Corp.*, 423 F. 2d 957, 959 (2 Cir., 1970), *Cert. Den.* 400 U.S. 833 (1970).

The court below applied the standard as set forth in the above authorities. That standard of sufficiency is a "question of law to be determined by the court": 9 Wright and Miller, *Federal Practice and Procedure*,

§2524. Also, the question of obviousness or nonobviousness is a question of law for the court.

It is also well established that, when a Court of Appeals comes to the conclusion which the court did in this case, it is appropriate for it to direct the entry of judgment for the defendant. In *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967), this Court held (pp. 321-22):

> "The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50 (b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* See *Baltimore & Carolina Line, Inc. v. Redman, supra.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n. o. v.* on appeal. Section 2106 of Title 28 provides that,
>
> > " 'The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.' "

See also *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Levin v. Mississippi Corp.*, 386 U.S. 162 (1967); *United States v. Generes*, 405 U.S. 93, 106-07 (1972); *United States v. Denby*, 522 F. 2d 1358 (5 Cir., 1975); *Gross v. Southern Railway Co.*, 446 F. 2d 1057 (5 Cir., 1971); *Monday v. United States*, 421 F. 2d 1210 (7 Cir., 1970); *Rosenbloom v. Metromedia, Inc.*, 415 F. 2d 892 (3 Cir., 1969), *Aff.* 403 U.S. 29 (1971).

Petitioner's contention that the appropriate standard of review was not followed by the Court of Appeals evidently is based upon *nothing* contained in the Opinion of the court except the footnote at page 9b which cites *Lavender v. Kurn*, 327 U.S. 645 (1946). The Court of Appeals did not *reject* the principles stated in *Lavender v. Kurn, supra*, but merely said that that case was inapplicable because "the jury was not here required to evaluate the question of obviousness in light of the invention *as claimed*" and that, hence, the rule in *Lavender* could not aid White. In other words, the court concluded that there was substantial agreement on the controlling facts bearing on the legal issue of obviousness and, therefore, there was no evidence to be viewed in the light most favorable to White and that there were no reasonable inferences which could be drawn from the evidence in favor of White. In short, the court did not *reject* the doctrine of *Lavender v. Kurn, supra*. It merely said that it does not aid White in view of the agreement between the parties as to the facts relevant to the legal issue of obviousness.

As pointed out in *Lavender v. Kurn*, "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences" (p. 653) the rule of *Lavender v. Kurn* is applicable. Here,

however, the court not only found a *lack* of dispute in regard to the relevant facts on the issue of obviousness, but it also found that "the jury could not reasonably have concluded" that the invention claimed would have been unobvious. In other words, the evidence was such that "fair-minded men" could not draw different inferences.

C. The Court Below Did Not Disregard Any Direction by Congress that It Protect Litigants' Jury Trial Rights

The suggestion by petitioner that the court below disregarded the due process requirements mentioned in the legislative history is unjustified. The portion of the legislative history from which petitioner took excerpts relates only to technical assistants which have been used by the judges in the Court of Customs and Patent Appeals and merely cautions that the court should bear in mind in using them that, where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

There is nothing in the Opinion of the court below suggesting that it used technical assistants in determining questions of fact; and there is nothing in the Opinion indicating that the court was unaware of the due process requirements or the standards of review applicable to the matters before it in this case.

D. The Court Below Did Not Indulge In *De Novo* Fact Finding and Was Fully Cognizant of Its Role in Deciding Appeals in Patent Cases

Connell v. Sears, Roebuck & Co., 722 F. 2d 1542 (CAFC, Nov. 23, 1983), decided just prior to the deci-

sion in this case, shows that the court clearly recognized its role in appellate proceedings, and particularly in appeals in cases tried before a jury. After pointing out (a) that jury verdicts should be treated with deference, (b) that deference due the jury fact findings is not so great as to require acceptance of findings where those findings are clearly and unquestionably not supported by substantial evidence and (c) that the Seventh Amendment preserves the right to a trial by jury, the court stated (p. 1546):

> "To govern consideration of motions for a directed verdict and for judgment notwithstanding the verdict, guidelines consistent with the Seventh Amendment and the cited Rules have been set forth in the cases. See *Boeing Co. v. Shipman*, 411 F. 2d 365, 374 (5th Cir. 1969) (en banc); *Mays v. Pioneer Lumber Corp.*, 502 F. 2d 106, 107 (4th Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S.Ct. 1125, 43 L.Ed.2d 398 (1975); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980).
>
> "Under these guidelines, a court must: (1) consider all the evidence; (2) in a light most favorable to the non-mover; (3) drawing reasonable inferences favorable to the non-mover; (4) without determining credibility of witnesses, and (5) without substituting its choice for that of the jury between conflicting elements in the evidence. The court should not be guided by its view of which side has the better case or by what it would have done had it been serving on the jury. If, after following those guidelines, the court is convinced upon the record before the jury that reasonable persons could not reach or could not have reached a verdict for the non-mover, it should grant the motion for directed verdict or for JNOV."

The Court of Appeals for the Federal Circuit has consistently adhered to the standard of review set forth in the *Connell* case.

In *Perkin Elmer Corp. v. Computervision Corp.*, ____ F. 2d ____, 221 USPQ 669 (CAFC, 1984), the court again recognized the appropriate standard of review, stating (pp. 672-73):

> "When a party moves for JNOV, the trial court must consider all the evidence in a light most favorable to the non-mover, must draw reasonable inferences favorable to the non-mover, must not determine credibility of witnesses, and must not substitute its choice for that of the jury between conflicting elements in the evidence. Railroad Dynamics, Inc. v. A Stucki Co., ____ F. 2d ____, ____, 220 USPQ 929, 936 (Fed. Cir. 1984); Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1546, 220 USPQ 193, 197 (Fed. Cir. 1983). Following those guidelines, the court determines whether the evidence so viewed constitutes 'substantial evidence' in support of the jury's findings and, if so, whether those findings can support the legal conclusions necessarily drawn by the jury in accord with its instructions enroute to its verdict. Railroad Dynamics, Inc., supra, ____ F.2d at ____, 220 USPQ at 936. 'Substantial' evidence is such relevant evidence from the record taken as a whole as might be accepted by a reasonable mind as adequate to support the finding under review. Loyce E. Hayes v. Department of the Navy, No. 83-1210, sl. op. at 5 (Fed. Cir., February 9, 1984); SSIH Equipment S.A. v. USITC, 718 F.2d 365, 371 n.10, 218 USPQ 678, 684 n. 10 (Fed. Cir. 1983). In sum, only when the court is convinced upon the record

> before the jury that reasonable persons could not have reached a verdict for the non-mover, should it grant the motion for JNOV. Railroad Dynamics, Inc., supra, ___ F.2d at ___, 220 USPQ at 936."

That court in a later case, *Preemption Devices, Inc. v. Minnesota Mining and Manufacturing Company*, ___ F. 2d ___, 221 USPQ 841, 842 (CAFC, 1984), pointed out that it was not the appellate function to decide factual issues *de novo*, citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), and proceeded to apply the proper standard of review in non-jury cases.

Hence, there is a total lack of substance in petitioner's argument that the court below was unaware of and failed to follow the appropriate standard of review. This is also true as to petitioner's allegations that the Court of Appeals for the Federal Circuit is "headed in the wrong direction and does not understand the intent of Congress or the requirements of the Seventh Amendment." There is nothing in the court's Opinions to indicate an "insensitivity to and misunderstanding of constitutional jury trial rights" as asserted by petitioner.

In order to try to establish a basis for the argument that the court below concluded that it was not bound to apply the standard of review normally required under the Seventh Amendment, petitioner asserts that the court below determined that the invention *as claimed* was not disclosed in the '680 patent (Pet. p. 11). Petitioner also asserts that the court's failure to adhere to the standard of the Seventh Amendment "seems to proceed from a *de novo* factual determination that the White patent did not disclose a shortwall device." The court below made no such de-

terminations. Not one word in the Opinion provides justification for this argument. It seems to have been concocted by petitioner in order to try to find some basis for its argument that the court below indulged in *de novo* factual determinations contrary to determinations made by the jury.

E. The Court Below Did Not Mishandle the Facts. It Merely Correctly Applied the Law to the Facts

We shall not burden the Court with a discussion of the points raised in the petition at pages 17-23. Petitioner has failed to point to any mishandling of facts and has failed to point to any *de novo* fact finding. Petitioner also has failed to differentiate between matters of fact and matters of law. For example, petitioner (Pet. p. 17) treats the "nature of the claims" as a factual matter; whereas, the nature and construction of claims is a matter of law, as is the issue of obviousness. Petitioner is merely complaining that the Court of Appeals did not adopt its *arguments* which, in large measure, were contrary to the immutable disclosures and statements in the prior art patents and contrary to undisputed evidence as to the scope and content of the relevant prior art and the lack of differences between that prior art and the *claimed* subject-matter.

V.
CONCLUSION

We respectfully submit that the petition should be denied and that the judgment in favor of defendants entered by the District Court on the mandate from the Court of Appeals should stand.

Respectfully submitted,

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